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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

———— TERM, 1971

No. Misc.

VINCENT FORCHELLI and
CHARLES N. FORCHELLI,

Petitioners,

v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners, Vincent Forchelli and Charles N. Forchelli, respectfully pray that a writ of certiorai issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 21, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported appears in the appendix hereto at pp. 1a-4a. No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 21, 1971. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in its refusal to set aside or reduce as excessive the judgment of the District Court entered upon a verdict for plaintiff-respondent in the sum of $252,000., in a wrongful death action brought pursuant to Article 5, *Estates Powers & Trusts Law of New York* (1967), §5-4.3 for the wrongful death of an 18 year old college freshman.

2. Whether the Circuit Court's refusal to follow and be bound by decisions of the New York Courts with respect to damages for wrongful death, brought under Article 5, *Estates Powers & Trusts Law* (1967), §5-4.3 of the Laws of New York was a denial to petitioner of due process of law under the *Fourteenth Amendment to the United States Constitution.*

3. Whether the decision of the Second Circuit, that it was not bound by New York State decisional law in assessing the damages due plaintiff is in conflict with the decisions of the Ninth Circuit Court of Appeals requiring this Honorable Court to determine which of the Circuit Court decisions is to be followed.

4. Whether the Circuit Court erred by wrongfully computing petitioner's loss based upon a discount for present value.

Statutory Provisions Involved

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3:

> "The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the de-

cedent's death shall be added to and be a part of the total sum awarded. L. 1966, c. 952, eff. Sept. 1, 1967."

Statement of the Case

Respondent's intestate, an 18 year old college freshman was killed when petitioners' car in which respondent's intestate was a passenger turned over. The accident occurred on April 20, 1969 on James Street, Syracuse, New York. Respondent's intestate was an Honors freshman student at Syracuse University, Syracuse, New York. At the time of the accident respondent's intestate was 18½ years of age, having been born on October 24, 1950.

The action was brought in the District Court, based upon diversity of citizenship between the respondent, a resident of the State of Connecticut and petitioners, residents of the State of New York. The action was brought pursuant to Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3 by the deceased's mother as sole survivor and was limited to her pecuniary loss under the New York Statute.

At the trial in District Court and in the Circuit Court of Appeals petitioners conceded that decedent had an average I.Q. of 134; had graduated from high school with a 92.09 average and ranked 4 in his Honors program class at Syracuse University and was attending college under a full tuition scholarship.

There was some testimony that decedent might study law or journalism and that he intended to support his mother, the respondent.

There was testimony that petitioner was self-supporting and netted $75. weekly from her job.

In the Circuit Court of Appeals petitioner argued: (1) that the verdict of the jury was excessive, based upon

passion and prejudice; (2) that the trial court correctly instructed the jury on the New York Law of damages for wrongful death within the meaning of Article 5, Estates Powers & Trusts Law (1967), §5-4.3, but that the jury misapplied the law; (3) that the Circuit Court was bound to follow the New York Law of damages for wrongful death as set forth in the Statute and in New York Decisional Law, in evaluating the jury verdict; (4) that the jury misapplied the New York Law with respect to discounting for present value and that by any rational computation based upon New York Law, the verdict was grossly excessive; (5) that the trial court erred in refusing to grant petitioner's motion to set aside the verdict.

The Circuit Court, in its opinion, set out at p. 4a of the Appendix to this Petition, refused to follow and be bound by the Decisional Law of the State of New York, *Lex Loci* of the accident and where decedent and petitioners resided and despite the fact that respondent's action was based solely upon Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3.

The Circuit Court in its opinion failed properly to compute and set forth its computations of respondent's pecuniary loss, based upon the New York Statute and properly discount said sum based on present value.

REASONS FOR GRANTING THE WRIT

The Circuit Court, by refusing to apply New York decisional law in assessing the excessive nature of the instant verdict and judgment promotes "forum shopping" and sets out the Federal Courts as the optimum forum for recovery of exhorbitant verdicts.

The instant case is a prime example of "forum shopping" by respondent, a resident of Connecticut, who could

have brought her action in the New York State Supreme Court. However, recognizing the New York Appellate Court's limitation on recovery in cases of this kind respondent purposely chose the Federal Forum, *Covey Gas & Oil Co.* v. *Checketts* (C. C. A. 9th, 1951), 187 F. 2d 562; *Horowitz, Erie R.R. Co.* v. *Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies,* 23 So. Calif. Law Rev. 204, 215.

The respondent herein, the mother of decedent, an 18 year old college honors freshman, was awarded $252,000. for her pecuniary loss, in an action brought pursuant to Article 5, *Estates Powers & Trusts Law of New York,* §5-4.3. Relevant New York Appellate Court decisions in comparable cases have limited the maximum recovery to between $30,000. and $35,000., *Alfieri* v. *Cabot Corp.,* 17 A. D. 2d 455 (1962), 27 year old male earning in excess of $5,000. per year, contributing $2,600. per year to parents, verdict of $180,000. reduced to $30,000.; *Breckir* v. *Lewis,* 21 A. D. 2d 546 (1964), 21 year old bright female college student, verdict of $75,000. reduced to $35,000.; *LeBoeuf* v. *Newman,* 21 A. D. 2d 937 (1964), 17 year old male, exceptional high school junior, verdict of $55,000., reduced to $35,000.; *Lawler* v. *Nucastle Motors Leasing Inc.,* 35 A. D. 2d 450 (1970), 23 year old working female contributing $50. per week to divorced, unemployed mother, verdict of $55,000., reduced to $30,000.

The disparity of the instant verdict of $252,000. is obvious and its excessiveness is made more certain when the record is barren of any claim that respondent, 43 years of age, is in ill health and the record indicates that respondent is employed without claim that she is not self-supporting or that her mode of living was substandard.

The award of $252,000. even if invested conservatively at 5% will yield $12,600. yearly without ever invading the principal.

The Circuit Court in applying its own standards to determine the excessiveness of this verdict, and in refusing to apply New York Appellate Court standards to the verdict, has broadcasted an open invitation to plaintiffs to seek relief, wherever possible, exclusively in the Federal Courts.

The refusal of the Circuit Court to be bound by the decisions of the New York Appellate Courts clearly promotes the institution of personal injury litigation in the Federal Courts as the optimum forum. The trend toward using the Federal Court for this type of litigation is on the increase and as a result of this decision will probably increase at an accelerated pace.* This Honorable Court should grant petitioner's writ.

The 14th Amendment §1 of the United States Constitution prohibits the taking of property without due process of law.

It is respectfully submitted that if the Circuit Court is permitted to apply its own individual standards without regard to the relevant New York Decisional Law a defendant can never assess its financial obligation. No attorney can ever properly evaluate his client's responsibility. Settlement at any price demanded by plaintiff must

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*The administrative office of the United States Courts, Annual Report of the Director 1970, reveals that: The number of districts which terminated more cases than were filed dropped from 32 in 1969 to 13 in 1970 (II-33); that there were 96 tort cases pending in the Eastern District Court of New York in 1970, of which 73 had been commenced in 1970 (tables C-3 & C-3a); that of 338 pending tort cases in the Southern District of New York, 149 had been commenced in 1970 (tables C-3 & C-3a); there were 13,794 tort actions based on diversity of citizenship commenced in 1969-1970 (of which 7,621 were motor vehicle torts).

be the standard, without regard to the obligation to defend his client and protect his rights, even though the accident occurred in New York, and the parties (decedent) resided in New York and though the action is allegedly governed by New York substantive law, both as to liability and damages, *Frasier* v. *Public Service Interstate Transportation Co.*, 244 F. 2d 668 (C. C. A. 2, 1957).

Thus, the defendant in Federal Court is forced to settle every case of liability at plaintiff's price regardless of its reasonable value in New York State Courts or run the risk of financial ruin and additional litigation.

"Due process is a growth too sturdy to succumb to the infection of the least ingredient of error", *Roberts* v. *New York* (1935), 295 U. S. 264, 278.

Mr. Justice Frankfurter, in *Wolf* v. *Colorado* (1949), 338 U. S. 25, 27, aptly stated:

> "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what at a given time be deemed the limits or essentials of fundamental rights."

It is respectfully submitted that it is not "reasonable and right" to force petitioners-defendants to settle at any price demanded by plaintiffs (respondent) by using the Federal Court system as a weapon.

It is respectfully submitted that defendants (petitioners) rights to due process are being violated by the Circuit Court's decision herein within the full meaning of the Constitution.

The Circuit Court violated its own previous decisions in refusing to be bound by New York law and its opinion is in direct conflict with that of the Ninth Circuit.

This case was tried pursuant to Article 5, *Estates Powers & Trusts Law of New York* (1967), §5-4.3. The action is solely a creature of statute and limits recovery to the actual pecuniary loss of decedent's survivor. No action for wrongful death existed under common law.

The District Court instructed the jury on the New York law as to the measure of damages for wrongful death.

It is clear that the Trial Court recognized his obligation to instruct the jury on the New York Law as the measure of damages. Surely if the jury was instructed as to the New York Law with respect to the measure of damages, the Circuit Court was bound to examine the verdict of the jury within the perimeter of New York Law.

The Circuit Court of Appeals in its opinion (pp. 1a-4a Appendix) stated that in reviewing the excessiveness of the verdict it was not bound by New York Law. This decision was in violation of its own decisional law, *Frasier* v. *Public Service Interstate Transportation Co.*, 244 Fed. 2d 668 (1957), and in conflict with decisions of the Circuit Court of Appeals for the 9th Circuit: *Johnson* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co., Covey Gas & Oil Co.* v. *Checketts* (1951), 187 Fed. 2d 562.

Petitioner's brief to the Circuit Court reviewed the relevant New York case law on damages for wrongful death of infants or young adults in the intestate's age group The New York decisional law clearly demonstrated the disparity between the New York Appellate Court's assess-

ment of damages (between $30-$35,000.) and the instant verdict of $252,000.

Alfieri v. *Cabot Corp.*, 17 A. D. 2d 455 (1962), $180,000 reduced to $30,000, 17 year old male earning in excess of $5,000 per year who contributed $2600 per year to parents;

Breckir v. *Lewis*, 21 A. D. 2d 546 (1964), $75,000 reduced to $35,000, 21 year old bright female college student;

LeBoeuf v. *Newman*, 21 A. D. 2d 937 (1964), $55,000 reduced to $35,000, 17 year old male exceptional high school junior;

Lawler v. *Nucastle Motors Leasing Inc.* (A. D. 2nd Dept.) (1970), 317 N. Y. S. 2d 99, $55,000 reduced to $30,000, 23 year old working girl contributing $50 per week to divorced unemployed mother. It should be noted that plaintiff in the case at her bar works and is self-supporting.

Reason and logic dictate that in the instant case, solely a creature of New York Statutory Law, and where the Trial Court instructed the jury with respect to New York decisional law as to respondent's pecuniary loss, the Circuit Court was bound to apply New York decisional law in assessing respondent's measure of damages. The Circuit Court has stated:

> "The measure of damages for wrongful death is determined by the law of the place where the fatal injury occurred."
>
> *Frasier* v. *Public Service Interstate Transportation Co.*, 244 F. 2d 668 (C. C. A. 2, 1957).

If New York decisional law were not to be the cornerstone for this Court's inquiry into the excessiveness of the jury's verdict, it is submitted that chaos would result. However could a defendant fairly evaluate its responsibility for damages in Federal Court? Certainly if there were to be a separate rule or result, a race for a more lucrative forum would not be conducive to the even and fair administration of justice.

It is not the defendant who selects the choice of forum but the plaintiff. Thus a defendant who is involved in an accident in New York in assessing the rational limits of his responsibility must be able with a fair degree of reasonable certainty to know the depths of his obligation.

If there be one set of standards by which a defendant may determine the limits of his responsibility then the defendant is fairly protected. However, if because the plaintiff selects a Federal forum, defendant is placed in the position where a Court's assessment of a New York Federal jury's verdict is to be determined by a panoply of determinations made throughout 50 states with varying standards and all Federal Courts, the defendant is unprotected. Then the statement that the measure of damages is to be determined by the law of the place of accident is without meaning.

The disparity between the instant verdict and New York Appellate decisions in similar cases clearly required the Circuit Court to apply New York Law. The Circuit Court's refusal to apply New York Law was clearly error.

It is respectfully submitted that this Honorable Court should grant petitioner's writ to the Circuit Court.

The Circuit Court erred in misapplying the theory of discounting for present value to sustain a monstrous award.

The plaintiff herein, mother of the decedent was awarded $252,000. by the jury for the wrongful death of her son, an 18 year old college freshman.

In determining plaintiff's pecuniary loss under Article 5, *Estates Powers & Trusts Law*, §5-4.3, the District Court instructed the jury to discount any sum awarded for present value.

Under any theory of *Discounting for Present Value*, the recipient is to receive such a sum as the jury determines she had a right to expect from decedent for her life expectancy, discounted for present value.

By its very nature the verdict is demonstrably grossly excessive and monstrous, *Affolder* v. *New York, Chicago and St. L. R. Co.*, 339 U. S. 96. The award of $252,000. (which is non-taxable), if invested by plaintiff at 5%, a conservative interest rate, will yield $12,600 yearly without ever invading the principal. Even if this jury considered erroneously the deduction of counsel fees of one third, the resultant remainder of $168,000 invested at 5% would yield $8,400 for life without invading the principal. Thus to take the lesser figure of $8,400, plaintiff-appellee can really be seen to have been given an award of at least an additional $302,400.00 or a total of $480,400 based upon plaintiff-appellee's life expectancy of 36 years. (The jury did in fact ask the Trial Court a question as to attorney's fees.)

It is respectfully submitted that with an annual income as described above, it is highly unlikely that respondent will ever take the Circuit Court's suggestion in its opinion (p. 4a, Appendix) and invade the princi-

pal[illegible] provide herself with an annual income of $16,000. Respondent, 43 years of age, has always been gainfully employed and self-supporting and there was never any suggestion that her mode of living was substandard.

The Circuit Court in its opinion (Appendix p. 4a) stated:

> "If one calculates the annual income which Mrs. Hart would receive from the $252,000 award based on an investment interest of 6 per cent and also assuming that she would draw on principal as well as income so that at the end of her 35 year life expectancy there would be nothing left, she would have a yearly income of approximately $16,500."

This same Circuit Court has reversed a judgment for plaintiff where the District Court failed to properly discount for present payment, *O'Connor* v. *U. S.* (C. C. A. 2d 1959), 269 F. 2d 587. The standard is not whether plaintiff may choose her income level and need to invade principal but rather that plaintiff's standard of living is measured by plaintiff's pecuniary loss and the principal must be invaded to provide plaintiff's income.

This Honorable Court has criticized and/or reversed Circuit Court decisions which failed to properly compute damages, *Grunenthal* v. *Long Island R.R.*, 393 U. S. 156 (1968); *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474 (1933). The New York Courts approve the application of the Discount Theory, 1 *Pattern Jury Instructions*, 2:320, pp. 517, 518; Lawless, *Computation of Future Damages; A View from the Bench*, 54 Georgetown L. J. 4, 1131 (1966).

It is respectfully submitted that this Court should establish definitive standards for computing damages other-

wise one more link in the "Forum Shopping" chain will have been forged.

When the state court adheres to standards and the federal forum applies what may be termed loose and liberal standards, there can be no doubt that plaintiff's will and this plaintiff-respondent certainly did, invariably use the Federal Courts as the most lucrative forum.

It is respectfully submitted that this Court should grant petitioner's writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 926—September Term, 1970.

(Argued June 23, 1971 Decided July 21, 1971.)

Docket No. 71-1128

LUCIE DOLORES HART, as Administratrix of the Goods, Chattels and Credits of Timothy J. Hart, deceased,

Plaintiff-Appellee,

v.

VINCENT FORCHELLI and CHARLES N. FORCHELLI,

Defendants-Appellants.

Before:

SMITH and HAYS, *Circuit Judges,*
and POLLACK, *District Judge.**

Appeal from plaintiff's judgment in motor vehicle negligence death action on trial to the jury in the United States

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* United States District Judge for the Southern District of New York, sitting by designation.

Opinion of the United States Court of Appeals

District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*.

Affirmed.

EDWARD H. SCHIFF, New York, N. Y. (Thomas V. Kingham, Harold L. Cowin, New York, N. Y., of counsel), *for Defendants-Appellants*.

MARVIN V. AUSUBEL, New York, N. Y. (Emile Z. Berman and A. Harold Frost, New York, N. Y., of counsel), *for Plaintiff-Appellee*.

PER CURIAM:

This is an appeal from the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*) from the award of damages by the jury of $252,000 in an automobile negligence death action. The sole ground for appeal is that the amount of the award is excessive.

The facts are relatively simple and not in dispute. The decedent, Timothy J. Hart, age 18, was killed in an automobile accident on the night of April 20, 1969 when he was a passenger in a car driven by the appellant, Charles N. Forchelli. At the time of the accident, Hart was a freshman at Syracuse University. He had been an outstanding athlete in high school as well as an accomplished scholar. He attended the University on a full scholarship standing fourth in an honors program and had tentative plans to become an attorney. His mother, Lucie Dolores Hart, the plaintiff in this action, was at the time of the accident forty-one years of age, in excellent health, and had a life

expectancy of thirty-five years. She had been abandoned by her husband some years before and was employed for $75 per week at the Catholic House of Retreat in Willimantic, Connecticut. There was evidence that the decedent had voiced his intention to support his mother so that she would not have to work as soon as he had finished his education.

The scope of review in the appellate courts in examining the excessiveness of a jury verdict is, of course, extremely limited. For many years the law in the federal courts was that an appellate court had no power at all to examine a jury's verdict in this regard. It was not until 1956 that this circuit departed from that position in *Comiskey* v. *Pennsylvania R.R.*, 228 F. 2d 687 (2d Cir. 1956). A few years later in *Dagnello* v. *Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961), Judge Medina examined the question with his customary thoroughness. He concluded:

> And so we hold we have the power to review the order of a trial judge refusing to set aside a verdict as excessive. If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether

> that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law. [*Id.* at 806.]

The standard we are to apply is hardly a precise one. As the Supreme Court noted in a footnote in its opinion in *Gruenthal* v. *Long Island R.R.*, 393 U. S. 156, 159 (1969):

> The standard has been variously phrased: "Common phrases are such as: 'grossly excessive,' 'inordinate,' 'shocking to the judicial conscience,' 'outrageously excessive,' so large as to shock the conscience of the court,' 'monstrous,' and many others."

Moreover, it is not particularly helpful to examine numerous state cases since federal juries are not bound by the amount that the New York juries have awarded or New York courts have approved or disapproved. *Brown* v. *Louisiana & Arkansas Ry.*, 429 F. 2d 1265 (5 Cir. 1970).

If one calculates the annual income which Mrs. Hart would receive from the $252,000 award based on an investment interest of 6 per cent and also assuming that she would draw on principal as well as income so that at the end of her 35 year life expectancy there would be nothing left, she would have a yearly income of approximately $16,500.

While it is true that an examination of the various New York and federal cases cited by both parties reveals this to be one of the largest awards on record in a wrongful death action with only one surviving dependent where that dependent is not the decedent's spouse, we are nevertheless unable to conclude that the amount is so unreasonable as to justify this court's intervention.

The judgment of the district court is therefore affirmed.

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

LUCIE DOLORES HART, as Administratrix of the Estate of TIMOTHY J. HART, deceased,

Plaintiff,

—against—

VINCENT FORCHELLI and CHARLES N. FORCHELLI,

Defendants.

This action came on for trial before the Court and a jury, Honorable Jack B. Weinstein, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged the plaintiff recover of the defendants the sum of Two Hundred Fifty Two Thousand ($252,000.00) Dollars together with interest at the rate of six (6%) percent per annum from April 20, 1969 to the date of judgment, to wit, Twenty Five Thousand Two Hundred ($25,200.00) Dollars, making a total of Two Hundred Seventy Seven Thousand Two Hundred ($277,200.00) Dollars, together with interest as provided by law and costs when taxed.

Dated at Brooklyn, New York, this 21st day of December, 1970.

JOHN B. WEINSTEIN
U.S.D.J.